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Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 351, MISC.

JAMES R. KELLEY, PETITIONER,

v.

DELAWARE, LACKAWANNA & WESTERN RAILROAD, RESPONDENT.

BRIEF ON BEHALF OF THE RESPONDENT, DELAWARE, LACKAWANNA & WESTERN RAILROAD, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

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I.

The Opinions of the Courts Below.

The opinion of the Court of Appeals for the First Circuit is reported in 170 Fed. (2d) 195. The opinion of the District Court for the District of Massachusetts is reported in 76 Fed. Supp. 600.

II.

The Statute Relied on by the Petitioner.

Massachusetts General Laws, c. 223, sec. 38, as most recently amended by Acts of 1939, c. 451, sec. 61, is as follows:

> "In an action against a foreign corporation, except an insurance company, which has a usual place of

business in the commonwealth, or, with or without such usual place of business, is engaged in or soliciting business in the commonwealth, permanently or temporarily, service may be made in accordance with the provisions of the preceding section relative to service on domestic corporations in general, instead of upon the commissioner of corporations and taxation under section three or section three A of chapter one hundred and eighty-one."

III.

Statement of the Case.

This is an action brought by the petitioner, who alleges that he is a resident of Massachusetts, against the respondent, a corporation, alleged to be organized under the laws of the State of New York but in fact organized under the laws of the Commonwealth of Pennsylvania, and having its principal office and place of business at 140 Cedar Street in the City, County and State of New York (R. 7). Service was attempted upon Henry F. Long, Commissioner of Corporations for the Commonwealth of Massachusetts, and upon Daniel L. Norton, an employee of the respondent, who has an office at 150 Causeway Street in Boston.

The respondent appeared specially through its attorneys and filed a motion to dismiss, contesting the jurisdiction of the Court over the respondent. This motion (R. 4) is based upon (1) the ground that the respondent is not doing business in the Commonwealth of Massachusetts and is not subject to the jurisdiction of the Court, and (2) the ground that the maintenance of the action will impose an unreasonable burden on interstate commerce. The motion was supported by the affidavit (R. 6) of Clyde F. Farmer, vice-president in charge of traffic of the respondent at its

New York office, and by the affidavit (R. 10) of Daniel L. Norton, the representative of the railroad in Boston.

At the time of the hearing upon the motion, the petitioner called as a witness Daniel L. Norton, whose testimony is set forth in full in the record (R. 22-37). Judge Sweeney entered judgment of dismissal on March 9, 1948 (R. 18). The Court of Appeals for the First Circuit affirmed the judgment of dismissal on October 29, 1948 (170 Fed. (2d) 195).

IV.

Questions Presented.

The petition specifies that the Court of Appeals erred: (1) In holding that a decision of the Supreme Judicial Court of Massachusetts is controlling. (2) In holding that the attempted service upon the General Agent of the Railroad and the Commissioner of Corporations and Taxation was unconstitutional under *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530 (1907). (3) In failing to consider the applicability of *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

V.

Argument.

Point A.

THE COURT OF APPEALS FOR THE FIRST CIRCUIT DID NOT ERR IN HOLDING THAT MASSACHUSETTS LAW, AS INTERPRETED BY ITS SUPREME JUDICIAL COURT, CONTROLS THE DECISION OF QUESTIONS INVOLVING SERVICE OF PROCESS ON FOREIGN CORPORATIONS IN MASSACHUSETTS.

The petitioner takes the inconsistent positions of relying on the Massachusetts statute, General Laws, c. 223, sec. 38,

as the basis for his service of process, but in denying that the limitation placed upon the statute by the highest Court in Massachusetts is controlling.

It is clear that the Supreme Judicial Court of Massachusetts has held in *Thurman* v. *Chicago, Milwaukee & St. Paul Ry. Co.*, 254 Mass. 569 (1926), that the statute in question does not apply to a railroad corporation which is engaged solely in the solicitation of interstate traffic within the Commonwealth. Although the statute uses the word "soliciting," the effect of the Court's ruling is that the "soliciting" contemplated by the statute is something other than the soliciting done by a railroad for the purpose of influencing prospective customers to use the facilities of the railroad in the states where the railroad has its lines and conducts its operations.

The opinion of the Court below (170 Fed. (2d) 195) should be read with *Pulson* v. *American Rolling Mill Co.*, 170 Fed. (2d) 193 (1948), where the Court states in detail the reasons for reaching its conclusion that Massachusetts law controls. The Court there points out that the federal question of due process is not reached until the state undertakes to exercise jurisdiction over the foreign corporation in a particular situation.

Footnote 3 on page 195 in *Pulson* v. *American Rolling Mill Co., supra,* shows that the Court considered and distinguished other Massachusetts cases where it held a foreign corporation subject to jurisdiction in the Commonwealth. These are cases which the petitioner relies on in his brief. It is submitted that an analysis of them demonstrates conclusively that there was something more than mere solicitation to establish the jurisdiction in each case.

Point B.

THE COURT OF APPEALS FOR THE FIRST CIRCUIT HAS CORRECTLY CONSTRUED THE DECISIONS OF THIS COURT IN HOLDING THAT THE EXERCISE OF JURISDICTION IN THIS CASE WOULD BE UNCONSTITUTIONAL.

The District Court judge, in his memorandum of decision (R. 21), found: "The facts in this case seem to be on all fours with those set forth in *Green* v. *Chicago, Burlington & Quincy Ry. Co.*, 205 U.S. 530" (1907). He found further that the defendant operated an office in Boston from which several men worked throughout New England soliciting business for the company's railroad line, which operates between Binghamton, New York, and Hoboken, New Jersey, and that the men who work out of this office are concerned only with freight traffic, as they do not handle passenger business and are engaged in no activity other than selling the road's transportation services. He entered a judgment of dismissal on authority of the *Green* case, *supra*.

The Court of Appeals, although holding that the first ground given in its opinion was sufficient, stated that, if an additional ground were needed, the judgment of the District Court would be sustained on authority of the *Green* case. It is submitted that the rulings of both Courts below are correct in their application of the *Green* case to the situation at bar. In the *Green* case, the United States Supreme Court had this to say at page 532: "Its validity depends upon whether the corporation was doing business in that district in such a manner and to such an extent as to warrant the inference that through its agents it was present there"; and further, at pages 533 and 534: "The business shown in this case was in substance nothing more than that of solicitation. Without undertaking to formulate any general rule defining what transactions will constitute 'doing business' in the sense that liability to service is in-

curred, we think that this is not enough to bring the defendant within the district so that process can be served upon it."

The similarity between the *Green* case, *supra*, and the case at bar is at once obvious. In this case, as in the *Green* case, the defendant had no lines of track within the state of the litigation, and the activities described by witness Norton are very similar to those of the agent in the *Green* case. All of the activities described by Norton were in furtherance of the general activity of solicitation. Although he kept account of numerous cars which originated in the New England territory, and which ultimately were carried on the defendant's lines, it is clear that he had no connection with the movement of these cars in any way, and, as he testified, his job was to interest shippers in shipping over the defendant's lines; and from that point on, all of the details as to routing, issuing of bill of lading and receiving payment were handled by the connecting carrier.

The *Green* case, *supra*, was followed by *Philadelphia & Reading Ry. Co.* v. *McKibbin*, 243 U.S. 264 (1917). In that case it is interesting to note that the plaintiff relied on two elements beyond mere solicitation. The first was that service was made in person on the president of the railroad, who was in New York on personal business, and the second was the sale by connecting carriers of tickets of the defendant railroad. It was therefore contended that the railroad was carrying on activities other than soliciting. The Court held, however, that service, even on the president of the railroad, was not sufficient to give personal jurisdiction over the corporation if it was not, in fact, doing business of such a nature as would otherwise subject it to service of process, and that the sale by connecting carriers of tickets to be used on the defendant's railroad when the passenger reached the defendant's lines did not constitute doing business sufficient to subject it to service of process.

The petitioner does not challenge the finding of the trial judge that the activities of the defendant corporation in Massachusetts did not amount to anything more than solicitation. His argument on this point appears to be that solicitation in itself is now sufficient to satisfy the constitutional requirements of due process of law notwithstanding the holding in the *Green* case. In this he relies upon *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and states that the Court below failed to consider this case in reaching its decision below. That the Court did consider that case is apparent from the opinion in *Pulson* v. *American Rolling Mill Co.*, 170 Fed. (2d) 193, at page 195. Although the Court recognized that the limitations as to jurisdiction over a foreign corporation are not as strict as they were once thought to be, it did not interpret the *International Shoe Co.* case as overruling the *Green* case. Indeed, in referring to the *Green* case in its opinion in the case at bar (170 Fed. (2d) 195) at page 196 the Court of Appeals said: "It has never been overruled."

It is submitted that there is nothing in *International Shoe Co.* v. *Washington, supra*, to indicate that this Court intended to overrule the *Green* case, either directly or by implication. The activities carried on by that corporation amounted to more than mere solicitation. The action was brought by the state itself as the result of activities carried on by the corporation within the state. In reaching its opinion the Court, at page 318, carefully reviewed and gave full recognition to the existence of the two lines of cases—one represented by *Green* v. *Chicago, Burlington & Quincy Ry. Co., supra*, and the other by *St. Louis Southwestern Ry. Co. of Texas* v. *Alexander*, 227 U.S. 218 (1913), the former denying jurisdiction where there was mere solicitation, and the latter sustaining jurisdiction where there were activities in addition to solicitation sufficient to amount to presence within the state for service of process.

The result of the *International Shoe Co.* decision was to subject the corporation to jurisdiction in a suit by the state to collect taxes based on the activities of those employed by it within the state. This falls far short of establishing that a railroad corporation which solicits traffic in Massachusetts to be carried on its lines in other states is carrying on activities in the State of Massachusetts sufficient to subject it to jurisdiction in Massachusetts for a cause of action arising in New York and having no relation to the activities carried on in Massachusetts.

The petitioner gives emphasis to the amount of solicitation carried on and the extent of the traffic resulting therefrom. But any attempt to compare the result of the solicitation with that in any other case is lacking, and is entirely conjectural. The purpose of solicitation is and always has been to get traffic to be carried over the lines of the railroad. Any contention that jurisdiction may be predicated upon the extent of the solicitation or any amount of traffic obtained is unsound. This Court recognized this in stating the basis of decision in the *International Shoe Co.* case, *supra*, as follows:

"It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. The test is not merely, as has sometimes been suggested, whether the activity, which the corporation has seen fit to procure through its agents in another state, is a little more or a little less. *St. Louis S. W. R. Co.* v. *Alexander, supra,* 228; [227 U.S. 228]; *International Harvester Co.* v. *Kentucky, supra,* 587. [234 U.S. 587]. Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that

a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations. Cf. *Pennoyer* v. *Neff* [95 U.S. 714], *supra; Minnesota Commercial Assn.* v. *Benn*, 261 U.S. 140.

"But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue. Compare *International Harvester Co.* v. *Kentucky* [234 U.S. 579], *supra*, with *Green* v. *Chicago, B. & Q. R. Co.* [205 U.S. 530], *supra*, and *People's Tobacco Co.* v. *American Tobacco Co.* [246 U.S. 79], *supra*" (p. 319).

The petition alleges that the decision of this case below by the Court of Appeals for the First Circuit is in conflict with the decision of the Court of Appeals for the Second Circuit in *Texas & Pacific Ry.* v. *Kilpatrick*, 166 Fed. (2d) 788. That case, however, was instituted under the *Federal Employers' Liability Act*, by the terms of which the railroad employer can be sued in any district in which it is "doing business" (45 U.S.C. sec. 56). It is submitted that the *Kilpatrick* case is applicable only to *Federal Employers' Liability Act* cases, in that the Court specifically recognizes that the "doing business" under that Act was something different from the "doing business" which is sufficient to confer jurisdiction in a case dependent upon the existence of diversity of citizenship.

Under the *Federal Employers' Liability Act* Congress has created the right of action, established the jurisdiction and prescribed the venue. The Court in the *Kilpatrick*

case determined that the requirements of section 6 of the statute were satisfied by the activities carried on in that particular case, even though they would not have been sufficient to satisfy the requirements of due process as to general jurisdiction in a case based on diversity of citizenship.

The same result has been reached by this Court in cases arising under the anti-trust laws, where this Court has recognized "transacting business" to satisfy the jurisdictional requirements of the anti-trust statute to be different from "doing business" sufficient to subject a nonresident corporation to general jurisdiction in a non-statutory case. *United States* v. *Scophony Corp.*, 333 U.S. 795 (1948). *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359 (1927).

As this Court points out in its *Scophony* opinion, the question in that type of case is one of statutory construction, not one of constitutional import.

In the case at bar, neither the District Court nor the Court of Appeals reached the question of the burden on interstate commerce raised in the respondent's motion to dismiss. It is submitted, however, as an additional reason for sustaining the Court of Appeals. *Davis* v. *Farmers Cooperative Equity Co.*, 262 U.S. 312 (1923). *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wells*, 265 U.S. 101 (1924). *Michigan Central R. Co.* v. *Mix*, 278 U.S. 492 (1929). *Denver & Rio Grande Western R.R. Co.* v. *Terte*, 284 U.S. 284 (1932).

VI.

Conclusion.

It is respectfully submitted that the petition should be denied.

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